IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

COMPANY PETITION NO.372 OF 2004

. In the matter of Essar Investments Ltd

HFCL Infotel Ltd .... Petitioners

Shri D.D. Madon with B. Colabawala i/b. Kanga and Co. for the petitioner.

Shri Janak Dwarkadas with Ms. Anita Castellino i/b. Deepa Kamath for the company.

CORAM: S.U. KAMDAR, J.

DATE : 24TH MARCH, 2005.

P.C. :

1. The present petition is filed for the recovery of Rs.13,14,94,201/-. The claim is based on two agreements which are entered into among the various companies. The petitioners and the respondent are two of the said companies who are parties to the said agreement. Exhibit-A to the petition is the first agreement dated 20.12.1999. The said

agreement was inter-alia entered into for taking over the telecom licence business which was granted to the respondent company for providing basic telecommunication services in the Punjab Telecom Circle. Under Clause-1d of the said agreement it was inter-alia provided that the then existing debt of the company will be termed as an ‘Assigned Debt’. In the said clause different debts payable by the company to third parties are set-out. It is the case of the petitioner that this claim which was payable to various third parties amounting to approximately Rs.14.10 crores was paid by the petitioner to the company so as to enable the company to discharge the third party liabilities. Various terms and conditions of the agreement further provides for reciprocal obligation on the part of both the petitioner and respondent company. The said amount described as ‘Assigned Debt’ has been paid by the company to the petitioner in discharge of their one of the obligation under the said agreement. Under clause-2 of the said agreement it was provided that there will be sell of shares by the respondent company for redemption

premium of Rs.16.80 crores.

2. The basic scheme appears to be that the company known as Essar Commivision Ltd who is conferred with the licence was proposed to be taken over by the petitioner herein and thus it was provided that the respondent company should discharge the liabilities of third parties who were their debtors. The said agreement contains various reciprocal obligations between the parties to be complied with for the purpose of performance of the said agreement. Subsequently second agreement was executed on 5.1.2001. Under clause -10 of the said second agreement it is provided that the Essar Investments Limited acknowledges the liabilities and undertakes to discharge the same being an amount of Rs.14.10 crores to the third parties within a period of 30 days from the date of execution of the said agreement. It is therefore provided that if the company does not discharges the said liability within 30 days the said company will pay to the petitioner the said amount so that

the company can discharge the liability of the said third parties. It is also provided in clause 10 that till and until the payment is effected as mentioned therein respective obligations of third parties shall stand suspended. The petitioners have contended that under the aforesaid clause 10 of the agreement the company is liable to make payment of Rs.14.10 crores to the petitioners. In respect of this claim the petitioner has relied upon two letters of acknowledgement dated 4.4.2002 and 29.6.2002 and has contended that in view of the acknowledgment of the liability the respondent company is liable to make payment of the aforesaid amount.

3. On the other hand the respondent company has contended that this amount is not due and payable to the petitioner herein. It is also contended that the said amount is infact the liability of the third parties and thus the petitioner cannot claim the said amount. It has also been contended that said clause-10 of the said agreement is merely a security so that the payment should be effected and

it is not an obligation to pay to the petitioner towards the debt due and payable to the petitioner herein. In the affidavit in reply it has been contended that the agreement contains various reciprocal obligations and the entire scheme is to take over the business of the company known as Essar Commivisions Ltd. The payment of amount claimed by the petitioner is towards discharge of the third party liabilities in consideration for taking over the said company. The said Essar Commivision is already been amalgamated with the petitioner and thus in effect the same is taken over by the petitioner itself. In the light of the aforesaid facts I do not find that the claim is a debt due and payable by the company to the petitioner. The agreement has various reciprocal obligations which are to be complied with. Even if the said clause-10 of the second agreement dated 5.1.2001 is to be given effect to still the said clause only provides for a stop gap arrangement and not an absolute obligation to pay as claimed by the petitioner. It is not possible to hold that the petitioner can enforce the said claim through the

media of winding up proceedings which is a summary jurisdiction. There are issues pertaining to interpretation of the agreement and considering of reciprocal obligations agreed upon in the present case. Thus in my opinion bonafide defences have been raised by the respondent company. Therefore I dismiss the petition. However there shall be no order as to costs.

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